

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

RENEE L. UNDERHILL,	)	
	)	No. CV-10-00277-CI
Plaintiff,	)	
	)	ORDER GRANTING PLAINTIFF'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	AND DENYING DEFENDANT'S
MICHAEL J. ASTRUE,	)	MOTION FOR SUMMARY JUDGMENT
Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 16, 19.) Attorney Maureen J. Rosette represents Renee Underhill (Plaintiff); Special Assistant United States Attorney Jordan D. Goddard represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 7.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, **DENIES** Defendant's Motion for Summary Judgment, and remands the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

**JURISDICTION**

Plaintiff protectively filed for disability insurance benefits (DIB) and Supplemental Security Income (SSI) on March 1, 2006, alleging disability beginning June 1, 2005. (Tr. 69-71, 16.) She alleged disability due to a heart condition, fainting, fatigue, and shortness of breath (Tr. 16, 95.) Her claim was denied initially and on reconsideration. (Tr. 29-32, 36-37.) Plaintiff requested a

1 hearing before an administrative law judge (ALJ), which was held on  
2 November 29, 2007, before ALJ Hayward C. Reed. (Tr. 16-24.)  
3 Plaintiff, who was represented by counsel, testified at the hearing  
4 held in Spokane. (Tr. 747-766.) Also testifying was medical expert  
5 Stanley Hoffman, M.D., and vocational expert Deborah Lapoint. (Tr.  
6 735-747, 766-770.) The ALJ denied benefits on August 22, 2008, and  
7 the Appeals Council denied review. (Tr. 16-24, 4-8A.) The instant  
8 matter is before this court pursuant to 42 U.S.C. § 405(g).

9 **STATEMENT OF THE CASE**

10 The facts of the case are set forth in detail in the transcript  
11 of proceedings and are briefly summarized here. At the time of the  
12 hearing, Plaintiff was 52 years old with a college education. (Tr.  
13 69, 92, 101, 161.) Plaintiff has past work experience in customer  
14 service, as a loan officer/auditor, mortgage loan officer, real  
15 estate agent and sales person. (Tr. 96.) Plaintiff stated she is  
16 married and lives in a motor home with her spouse. (Tr. 73.)  
17 Plaintiff reported that she experienced episodes later determined to  
18 be a seizure disorder. (Tr. 750-51.) During treatment after an  
19 episode, Plaintiff stated her heart condition was detected. (Tr.  
20 751.) Treatment included placement of a pacemaker and defibrillator.  
21 (Tr. 752, 196.) In September 2007, Plaintiff testified that she fell  
22 and broke her left hip. (Tr. 755.) In October 2007, Plaintiff  
23 testified she fell again, breaking her right hip. (*Id.*) Plaintiff  
24 states she has not returned to work since diagnosis of her seizure  
25 disorder in 2005. (Tr. 750.) She testified she is unable to work  
26 or drive due to seizures. (Tr. 750, 753, 761.) Plaintiff states  
27 she can lift about 5 pounds (Tr. 758), must elevate and ice her leg  
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1 3-4 times a day (Tr. 756), and nap 1 or 2 times a day for about an  
2 hour. (Tr. 763.) She also complained of numbness in all her toes.  
3 (Tr. 756.)

#### 4 ADMINISTRATIVE DECISION

5 ALJ Reed found Plaintiff's date of last insured for DIB  
6 purposes was March 30, 2009. (Tr. 18, Finding 1.) At step one, the  
7 ALJ found Plaintiff had not engaged in substantial gainful activity  
8 since June 1, 2005, the alleged onset date. (*Id.*, Finding 2.) At  
9 step two, he found Plaintiff had a severe impairment of congestive  
10 heart failure. (*Id.*, Finding 3.) The ALJ concluded Plaintiff's  
11 hip fractures were not severe because they did not meet the 12-month  
12 duration requirement. (Tr. 19.) The ALJ also found Plaintiff's  
13 seizure disorder was non-severe because it was well controlled by  
14 medication. (*Id.*) The ALJ determined at step three Plaintiff's  
15 medically determinable impairments, alone and in combination, did  
16 not meet or medically equal one of the listed impairments in 20  
17 C.F.R., Appendix 1, Subpart P, Regulations No. 4 (Listings). (Tr.  
18 19, Finding 4.) The ALJ found Plaintiff's subjective complaints  
19 regarding functional limitations were not fully credible. (Tr. 21.)  
20 At step four, he determined Plaintiff "has the residual functional  
21 capacity to perform light work as defined in 20 CFR 404.1567(b)  
22 except she can only stand and/or walk 2 hours in an 8-hour workday,  
23 occasionally climb, stoop, kneel, crouch, or crawl, should avoid  
24 hazardous conditions, and she should not be required to drive."  
25 (Tr. 20, Finding 5.) The ALJ found Plaintiff could perform her past  
26 relevant work as a loan officer because the "work does not require  
27 the performance of work-related activities precluded by the  
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1 claimant's residual functional capacity." (Tr. 23, Finding 6.) As  
2 a result, the ALJ concluded Plaintiff has not been under a  
3 disability from June 1, 2005, to the date of the decision. (Tr. 23,  
4 Finding 7.)

#### 5 STANDARD OF REVIEW

6 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
7 court set out the standard of review:

8 A district court's order upholding the Commissioner's  
9 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
10 211 F.3d 1172, 1174 (9<sup>th</sup> Cir. 2000). The decision of the  
11 Commissioner may be reversed only if it is not supported  
12 by substantial evidence or if it is based on legal error.  
13 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999).  
14 Substantial evidence is defined as being more than a mere  
15 scintilla, but less than a preponderance. *Id.* at 1098.  
16 Put another way, substantial evidence is such relevant  
17 evidence as a reasonable mind might accept as adequate to  
18 support a conclusion. *Richardson v. Perales*, 402 U.S.  
19 389, 401 (1971). If the evidence is susceptible to more  
20 than one rational interpretation, the court may not  
21 substitute its judgment for that of the Commissioner.  
22 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*  
23 *Social Sec. Admin.*, 169 F.3d 595, 599 (9<sup>th</sup> Cir. 1999).

24 The ALJ is responsible for determining credibility,  
25 resolving conflicts in medical testimony, and resolving  
26 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup>  
27 Cir. 1995). The ALJ's determinations of law are reviewed  
28 *de novo*, although deference is owed to a reasonable  
construction of the applicable statutes. *McNatt v. Apfel*,  
201 F.3d 1084, 1087 (9<sup>th</sup> Cir. 2000).

29 It is the role of the trier of fact, not this court, to resolve  
30 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
31 supports more than one rational interpretation, the court may not  
32 substitute its judgment for that of the Commissioner. *Tackett*, 180  
33 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
34 Nevertheless, a decision supported by substantial evidence will  
35 still be set aside if the proper legal standards were not applied in

weighing the evidence and making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If there is substantial evidence to support the administrative findings, or if there is conflicting evidence that will support a finding of either disability or non-disability, the finding of the Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

#### SEQUENTIAL EVALUATION PROCESS

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the requirements necessary to establish disability:

Under the Social Security Act, individuals who are "under a disability" are eligible to receive benefits. 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any medically determinable physical or mental impairment" which prevents one from engaging "in any substantial gainful activity" and is expected to result in death or last "for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). Such an impairment must result from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a claimant will be eligible for benefits only if his impairments "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy...." 42 U.S.C. § 423(d)(2)(A). Thus, the definition of disability consists of both medical and vocational components.

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of proof rests upon the claimant to establish a prima facie case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d

1 920, 921 (9<sup>th</sup> Cir. 1971). This burden is met once a claimant  
2 establishes that a medically determinable physical or mental  
3 impairment prevents her from engaging in her previous occupation.  
4 20 C.F.R. §§ 404.1520(a), 416.920(a). This requires the presentation  
5 of "complete and detailed objective medical reports of her condition  
6 from licensed medical professionals." *Meanel v. Apfel*, 172 F.3d  
7 1111, 1113 (9<sup>th</sup> Cir. 1999).

8 If a claimant cannot do her past relevant work, the ALJ  
9 proceeds to step five, and the burden shifts to the Commissioner to  
10 show that (1) the claimant can make an adjustment to other work; and  
11 (2) specific jobs exist in the national economy which claimant can  
12 perform. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v.*  
13 *Heckler*, 722 F.2d 1496, 1497-98 (9<sup>th</sup> Cir. 1984).

#### 14 ISSUES

15 The question is whether the ALJ's decision is supported by  
16 substantial evidence and free of legal error. Plaintiff argues the  
17 ALJ erred when he: (1) found Plaintiff's hip fractures and seizure  
18 disorder were non-severe; and (2) improperly rejected the opinions  
19 of Plaintiff's treating physician. (ECF No. 17 at 12, 13.)  
20 Plaintiff also argues new evidence considered by the Appeals Council  
21 but not reviewed by the ALJ supports remand.<sup>1</sup> Defendant contends the  
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24 <sup>1</sup> When the Appeals Council considers evidence submitted after  
25 the ALJ's decision in the context of denying review, the issue on  
26 appeal to federal court becomes whether the record is limited to the  
27 evidence presented to the ALJ or also includes the new evidence  
28 submitted to the Appeals Council, but never seen by the ALJ. In the

1 ALJ's decision is supported by substantial evidence and free of  
2 legal error. (ECF No. 20 at 6-15.)

3 **DISCUSSION**

4 **A. Step Two**

5 Plaintiff argues the ALJ erred at step two when he failed to  
6 find her hip fractures and seizure disorder were not severe  
7 impairments. (ECF No. 17 at 12.) To qualify for benefits under the  
8 Social Security Act, a claimant must establish that a medically  
9 determinable physical or mental impairment or combination of  
10 impairments (1) has lasted or can be expected to last 12 months and  
11 (2) limits the Plaintiff's ability to engage in substantial gainful  
12 activity. 42 U.S.C. § 423(d)(1)(A), (2)(B). The regulations state  
13 an impairment may be found to be not severe when "medical evidence  
14 establishes only a slight abnormality or a combination of slight  
15 abnormalities which would have no more than a minimal effect on an  
16 individual's ability to work." 20 C.F.R. §§ 404.1508, 416.908; 20

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18 Ninth Circuit, when the Appeals Council specifically considers new  
19 materials in the context of denying a claimant's request for review,  
20 "we consider on appeal both the ALJ's decision and the additional  
21 material submitted to the Appeals Council." *Ramirez v. Shalala*, 8  
22 F.3d 1449, 1452 (9<sup>th</sup> Cir. 1993); see also *Gomez v. Chater*, 74 F.3d  
23 967, 971 (9<sup>th</sup> Cir. 1996). If the new evidence shows there is a  
24 "reasonable possibility" that it would change the outcome of the  
25 ALJ's determination, then remand is appropriate to allow the ALJ to  
26 consider the evidence. *Mayes v. Massanari*, 276 F.3d 453, 462 (9<sup>th</sup>  
27 Cir. 2001). Because the Appeals Council considered Plaintiff's new  
28 evidence (Tr. 4-8A), it is part of the record this court reviews.

C.F.R. §§ 404.1520(c), 416.920(c). As directed in the Commissioner's ruling, "[g]reat care should be exercised in applying the not severe impairment concept." Social Security Ruling ("SSR") 85-28.<sup>2</sup> A decision of the ALJ will not be reversed for errors that are harmless, *Burch v. Barnhart*, 400 F.3d 676, 679 (9<sup>th</sup> Cir. 2005), but if new evidence shows there is a "reasonable possibility" it would change the ALJ's decision, then remand is appropriate. *Mayes v. Massanari*, 276 F.3d 453, 462 (9<sup>th</sup> Cir. 2001). Further, if new evidence is probative as to whether a claimant's impairments are severe, remand is appropriate. See *Johnson v. Schweiker*, 656 F.2d 424, 426 (9<sup>th</sup> Cir. 1981) (finding new evidence probative as to whether an impairment was severe and therefore "good cause" existed to remand the matter).

#### 1. Hip Fractures

The ALJ found Plaintiff's "hip fractures have not been severe for more than 12 months, and no longer cause significant limitations in the claimant's ability to perform basic work activities." (Tr. 19.) As the ALJ notes, "[i]n September 2007, claimant fell and

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<sup>2</sup> Social Security Rulings are issued to clarify the Commissioner's regulations and policy. They are not published in the federal register and do not have the force of law. However, under the case law, deference is to be given to the Commissioner's interpretation of the Regulations. *Ukolov v. Barnhart*, 420 F.3d 1002 n.2 (9<sup>th</sup> Cir. 2005); *Bunnell v. Sullivan*, 947 F.2d 341, 346 n.3 (9<sup>th</sup> Cir. 1991). The Supreme Court upheld the validity of the Commissioner's severity regulation, as clarified in SSR 85-28, in *Bowen v. Yuckert*, 482 U.S. 137, 153-154 (1987).



1 fractured her left hip requiring open reduction and internal  
2 fixation. Six weeks later, she fell and fractured her right hip  
3 requiring percutaneous pin fixation." (Tr. 19.) In finding  
4 Plaintiff's hip fractures "non-severe," the ALJ cites records from  
5 December 2007 to April 2008. Plaintiff was treated by two  
6 orthopedists-Dwight Keller, M.D., and J. Wheaton, M.D. In December  
7 2007, Dr. Keller notes her left hip is healing "vigorously," and in  
8 regards to her right hip he states, "[r]ight hip intracapsular  
9 fracture. It is in good position. Difficult to tell whether it is  
10 absolutely healed and of course there is a strong risk for avascular  
11 necrosis, but for now, nothing need be done except to treat her  
12 underlying debilitated condition." (Tr. 519.) Dr. Keller recommended  
13 physical therapy "for gait training, strengthening, stretching, and  
14 aerobic conditioning." (*Id.*) In March 2008, Plaintiff twisted her  
15 left ankle "when she stumbled on some irregular cement." (Tr. 590.)  
16 While she is noted to be still ambulating, it was with a cane.  
17 (*Id.*) In April 2008, Dr. Wheaton treated Plaintiff and found  
18 Plaintiff had an abnormal gait, and "[p]alpation around the hip and  
19 pelvis reveals exquisite tenderness in the right sacroiliac region,  
20 as well as the right trochanteric bursa. One can palpate some  
21 prominent pins in this area. Also of note in the lower extremities  
22 is significant atrophy and deconditioning." As the ALJ notes,  
23 surgery was recommended. (Tr. 19, referring to Tr. 591.) Dr.  
24 Wheaton's assessment included: right femoral neck fracture, healed  
25 with protrusion of pins and bursitis; inter-trochanteric fracture,  
26 left hip, healed with heterotopic ossification; right sacroilliac  
27 strain; ankle sprain; and cognitive impairment. (Tr. 591.)

1 While the ALJ's decision was rendered in August 2008, only 11  
2 months after Plaintiff sustained her first hip fracture, the record  
3 evidence suggests Plaintiff's hip fractures continued to have more  
4 than a minimal effect on Plaintiff's work abilities. The record  
5 evidence also supports that Plaintiff would continue to suffer  
6 effects for at least another month. Even though the ALJ found the  
7 hip fractures no longer limiting, the evidence Plaintiff was unable  
8 to sleep and still had an abnormal and antalgic gait does not  
9 support this conclusion. Because the ALJ's finding Plaintiff's hip  
10 fractures had not been severe for 12 months and were no longer  
11 causing limitations on work abilities was not supported by  
12 substantial evidence, remand is necessary.

13 Plaintiff's new evidence also supports remand. For example,  
14 Plaintiff's new evidence from November 2009 shows that while the  
15 pins were eventually removed, Plaintiff's pain significantly  
16 increased after removal. (Tr. 731.) Dr. Keller states, "she has  
17 had just an increasing pattern of pain since [the pin removal] to  
18 the point where it is now excruciating in her right groin." (*Id.*)  
19 Dr. Keller concludes, "Basically, her right hip avascular necrosis  
20 is [a] predictable consequence of her original injury to the right  
21 hip and there is no other effective treatment except a total hip  
22 arthroplasty."<sup>3</sup> (*Id.*) This new evidence shows both a "reasonable  
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24 <sup>3</sup> "Arthroplasty" is the "creation of an artificial joint to  
25 correct" a diseased joint. It is a "total joint arthroplasty" when  
26 "both joint surfaces are replaced without the removal of the  
27 articular disk." *Stedman's Medical Dictionary* 136 (25<sup>th</sup> Ed. 1990).  
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possibility" the ALJ's decision may change, *Mayes*, 276 F.3d at 462, and is also probative as to the continuing severity of Plaintiff's hip fractures during the relevant time, *Johnson*, 656 F.2d at 426. In short, while the ALJ found Plaintiff's hip fractures to be a non-severe impairment, neither evidence before the ALJ nor the new evidence Plaintiff provided to the AC supports this conclusion. As a result, the matter must be remanded to allow the Commissioner to make appropriate step two findings and conduct a new sequential evaluation.<sup>4</sup> While this issue requires remand and is dispositive, Plaintiff also challenged the ALJ's finding her seizure disorder was not severe and the rejection of the opinion of Plaintiff's treating physician, Dr. Poole.

## 2. Seizure Disorder

By contrast, the ALJ's finding Plaintiff's seizure disorder is non-severe was based on substantial evidence and new evidence does not require a remand on this issue. For example, the ALJ explained Plaintiff's neurologist, Shannon Grosdidier, M.D., found Plaintiff had not had a seizure since June 2007 (Tr. 637) and only her ability to drive was limited (Tr. 635). (Tr. 19.) As to Plaintiff's new

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<sup>4</sup> While Plaintiff did not challenge the ALJ's step three finding to this court relating to Plaintiff's use of a walker, the record is not clear whether Plaintiff was prescribed the walker or if as the ALJ concludes, "claimant's use of the walker is volitional to evoke sympathy, and not medically necessary." On remand, the ALJ should ascertain the extent of Plaintiff's restrictions on ambulation throughout the relevant time period.

1 evidence, while Dr. Grosdidier's September 2008 letter does clarify  
2 that Dr. Grosdidier not only limited Plaintiff's ability to drive  
3 but also her ability to work (Tr. 671), this letter has little  
4 evidentiary value because it was obtained only after the ALJ issued  
5 an adverse determination. *See Macri v. Chater*, 93 F.3d 540, 544 (9<sup>th</sup>  
6 Cir. 1996); *Weetman v. Sullivan*, 877 F.2d 20, 23 (9<sup>th</sup> Cir. 1989); *Key*  
7 *v. Heckler*, 754 F.2d 1545, 1550 (9<sup>th</sup> Cir. 1985). As a more favorable  
8 post-decision report not supported by independent new findings, the  
9 letter does not have a "reasonable possibility" of changing the  
10 ALJ's decision. *Mayes*, 276 F.3d at 462. Further, treating  
11 physicians are not entitled to special deference as to findings  
12 reserved to the Commissioner of whether Plaintiff is disabled. *SSR*  
13 *96-5p*. In summary, Plaintiff's new evidence regarding her hip  
14 fractures requires remand; however, the ALJ's finding Plaintiff's  
15 seizure disorder is non-severe was supported by substantial  
16 evidence, and new evidence does not change this conclusion.

17 **B. Rejection of Dr. Poole**

18 Plaintiff argues the ALJ improperly rejected the opinion of  
19 Plaintiff's treating cardiologist Jeanne Poole, M.D. (ECF No. 17 at  
20 20.) Defendant argues the ALJ's rejection was proper. (ECF No. 20  
21 at 12.) The opinions of treating physicians are entitled to  
22 controlling weight only as to the nature and severity of Plaintiff's  
23 impairments. *See SSR 96-2p; SSR 96-5p*. To receive controlling  
24 weight, the opinion must be well-supported and consistent with the  
25 other substantial evidence in the case record. *SSR 96-2p*. If not  
26 entitled to controlling weight, the contradicted opinion may only be  
27 rejected with "specific" and "legitimate" reasons supported by  
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1 substantial evidence in the record. *Flaten v. Secretary of Health*  
2 *and Human Serv.*, 44 F.3d 1453, 1463 (9th Cir. 1995) (citing  
3 *Magallanes v. Bowen*, 881 F.2d 747, 753 (9th Cir. 1989); *Fair v.*  
4 *Bowen*, 885 F.2d 597, 605 (9th Cir. 1989). The opinion of a non-  
5 examining medical expert supported by other substantial evidence in  
6 the record can be the basis upon which to reject the opinion of a  
7 treating or examining physician. *Magallanes*, 881 F.2d at 751-52;  
8 *Andrews v. Shalala*, 53 F.3d 1035, 1042-43 (9th Cir. 1995).

9 Plaintiff argues the ALJ improperly rejected the opinion of  
10 Plaintiff's treating cardiologist Jeanne Poole, M.D. (ECF No. 17 at  
11 20.) Defendant argues the ALJ's rejection was proper. (ECF No. 20  
12 at 12.) In March 2006, Dr. Poole opined Plaintiff was unable to  
13 drive and work for two years because of her cardiac condition and  
14 syncope. (Tr. 292.) The ALJ gave "little weight to the letter  
15 written by Jeanne Poole, M.D." because "Dr. Poole's opinion is  
16 without substantial support from the other evidence of record, which  
17 obviously renders it less persuasive." (Tr. 22-23.) In support of  
18 that statement, the ALJ refers to Plaintiff's treating neurologist,  
19 Dr. Grosdidier, who in June 2008 opined Plaintiff's only limitation  
20 due to epilepsy was an inability to drive. (Tr. 22.) The ALJ also  
21 refers to the opinion of Plaintiff's treating neurologist, Dr.  
22 Holmes. (*Id.*) Dr. Holmes opined, "In regards to working,  
23 [Plaintiff] should avoid occupations that would put her or others in  
24 harm should she experience loss of consciousness." (Tr. 291.) At  
25 the time of the ALJ's decision, no other provider felt Plaintiff was  
26 unable to work due to her seizure disorder. Further, just a few  
27 months prior to the ALJ's decision, Plaintiff's treating neurologist

1 Dr. Grosdidier found Plaintiff's last seizure was in June 2007.  
2 (Tr. 595-96.) In addition, relying on the testimony of medical  
3 expert Dr. Hoffman and objective testing, the ALJ found Plaintiff's  
4 cardiac condition had stabilized and improved. (Tr. 22.) The ALJ's  
5 reliance on the opinion of Dr. Hoffman and Dr. Hoffman's  
6 interpretation of objective testing is proper. *Allen v. Heckler*,  
7 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984) (stating "[T]o the extent that [the  
8 nontreating physician's] opinion rests on objective clinical tests,  
9 it must be viewed as substantial evidence"). The evidence before  
10 the ALJ did not support Dr. Poole's opinion. As a result, the ALJ  
11 did not err in rejecting the opinion of Dr. Poole because  
12 substantial evidence supports the ALJ's conclusion Dr. Poole's  
13 opinion is inconsistent with the record.

14 As for Plaintiff's new evidence, the September 2008 letter from  
15 Dr. Grosdidier states Plaintiff can neither drive nor work. (Tr.  
16 671). While Dr. Grosdidier's letter clarifies she does "not feel  
17 [claimant] is appropriate for full-time employment" (Tr. 671), this  
18 correspondence (1) is from the same doctor who provided an earlier  
19 letter (Tr. 635), (2) was submitted after the ALJ's unfavorable  
20 decision, and (3) was not supported by independent new findings.  
21 See *Weetman*, 877 F.2d at 23. The letter also reflects that Dr.  
22 Grosdidier's "last [treatment] note" was "dated April 23, 2008"  
23 which predated the doctor's first letter. In addition, the evidence  
24 from Dr. Holmes (Tr. 291) contradicts Dr. Grosdidier's opinion  
25 Plaintiff cannot work and supports the ALJ's decision. With the  
26 evidence the ALJ had before him, the ALJ's decision to reject Dr.  
27 Poole's opinion that Plaintiff cannot work is based on substantial  
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1 evidence. The new evidence does not reflect a "reasonable  
2 possibility" of changing the ALJ's decision on this issue. *Mayes*  
3 276 F.3d at 462.

4 Because remand is necessary due to the ALJ's findings related  
5 to Plaintiff's hip fractures, the matter will be remanded to the  
6 Commissioner for a new determination. Further, because the error at  
7 step two taints the entire sequential evaluation process, a new  
8 sequential evaluation must be undertaken including a new credibility  
9 determination. However, the court notes, a step two determination  
10 Plaintiff has a severe disability is merely a threshold  
11 determination, and Plaintiff may not necessarily succeed on her  
12 claim that she is disabled once the complete sequential evaluation  
13 is performed. See *Hoopai v. Astrue*, 499 F.3d 1071, 1076 (9<sup>th</sup> Cir.  
14 2007); *Harman v. Apfel*, 211 F.3d 1172, 1179 (9<sup>th</sup> Cir. 2000); *Tackett*  
15 *v. Apfel*, 180 F.3d 1094, 1100 (9<sup>th</sup> Cir. 1999); *Kail v. Heckler*, 722  
16 F.2d 1496, 1497 (9<sup>th</sup> Cir. 1984). Conversely, a reasonable ALJ may  
17 find Plaintiff "disabled" upon consideration throughout the  
18 sequential evaluation process of all limitations caused by medically  
19 determinable impairments (severe and non-severe) in combination (as  
20 required by 20 C.F.R. §§ 404.1523, 416.923). *Stout v. Commissioner,*  
21 *Social Sec. Admin.*, 454 F.3d 1050, 1056 (9<sup>th</sup> Cir. 2006).  
22 Accordingly,

23 **IT IS ORDERED:**

24 1. Plaintiff's Motion for Summary Judgment (**ECF No. 16**) is  
25 **GRANTED** and the matter is remanded to the Commissioner for  
26 additional proceedings consistent with the decision above and  
27 pursuant to sentence four of 42 U.S.C. § 405(g).  
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1           2.    Defendant's Motion for Summary Judgment (**ECF No. 19**) is  
2 **DENIED.**

3           3.    Application for attorney's fees may be filed by separate  
4 motion.

5           The District Court Executive is directed to file this Order and  
6 provide a copy to counsel for Plaintiff and Defendant. Judgment  
7 shall be entered for **PLAINTIFF** and the file shall be **CLOSED**.

8           DATED August 29, 2011.

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10                               S/ CYNTHIA IMBROGNO  
11                               UNITED STATES MAGISTRATE JUDGE  
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